

**The Honorable Richard A. Jones**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

CHRISTOPHER KING, J.D. A/K/A  
KINGCAST, and JOHN NOVAK,

Plaintiffs,

v.

LIQUOR AND CANNABIS BOARD OF  
THE STATE OF WASHINGTON; JANE  
RUSHFORD, Chair of the Liquor and  
Cannabis Board; RICK GARZA, Director  
of the Liquor and Cannabis Board; JAY  
INSLEE, Governor of Washington;  
ROBERT FERGUSON, Washington  
Attorney General; WILLIAM P. BARR,  
United States Attorney General; and  
OFFICE OF NATIONAL DRUG  
CONTROL POLICY

In their Individual and Official Capacities,

Defendants.

NO. 2:20-CV-01494-RAJ

STATE DEFENDANTS'  
MOTION TO DISMISS  
PURSUANT TO FRCP 12(b)1, 2

**NOTE ON MOTION  
CALENDAR:**

**December 11, 2020**

**I. MOTION**

The Honorable Jay Inslee, Governor of the State of Washington; Robert Ferguson, Washington State Attorney General; the Liquor and Cannabis Board of the State of Washington; Jane Rushford, Chair of the Liquor and Cannabis Board; and Rick Garza, Director of the Liquor and Cannabis Board (collectively, the State Defendants), respectfully move this Court for an order dismissing this action for lack of jurisdiction. Fed. R. Civ. Proc. 12(b)(1), (2). The First Amended Complaint (Complaint) fails to establish that Plaintiff's right to relief

necessarily depends on resolution of a substantial question of federal law. Alternately, the Eleventh Amendment bars this suit against the State Defendants. For the reasons set forth below, Plaintiffs' complaint against the State Defendants should be dismissed.

## II. MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

### A. Introduction

Plaintiffs Christopher King, J.D. and John Novak (Plaintiffs) brought this challenge to the authority of enforcement officers employed by the Washington State Liquor and Cannabis Board (LCB) as well as the LCB's regulation of the quality and variety of marijuana available at retail. Plaintiffs named as defendants Jay Inslee, Governor of the State of Washington; Robert Ferguson, Attorney General of the State of Washington; Jane Rushford, Chair of the Washington State Liquor and Cannabis Board; Rick Garza, Director of the Washington State Liquor and Cannabis Board; and the Washington State Liquor and Cannabis Board. Plaintiffs name the United States Attorney General and the Office of National Drug Control Policy as additional defendants.

### B. Factual Background

Years ago, Washington voters enacted an initiative measure to establish a licensing and regulatory system governing the production, processing, distribution, and possession of marijuana for recreational purposes. 2013 Wash. Sess. Laws ch. 3 (codified as part of Wash. Rev. Code ch. 69.50). That measure designated the Washington State Liquor Control Board, later renamed the Washington State Liquor and Cannabis Board (LCB), as the state agency responsible for issuing licenses to producers, processors, and retailers of marijuana and for adopting related rules. Wash. Rev. Code § 69.50.342, .345. Pursuant to Revised Code of

1 Washington (RCW) 66.44.010, LCB has the “power to enforce the penal provisions of this title  
 2 and the penal laws of this state relating to . . . liquor.” RCW 66.44.010(2). With the legalization  
 3 of recreational marijuana, LCB’s scope of authority expanded to include enforcement of the  
 4 state’s marijuana laws. RCW 69.50.500(a). In order to carry out its enforcement activities the  
 5 LCB “may appoint and employ, assign to duty and fix the compensation of, officers to be  
 6 designated as liquor enforcement officers.” RCW 66.44.010(4). As employees of a limited  
 7 authority Washington law enforcement agency, LCB enforcement officers are, by statute,  
 8 limited authority peace officers. RCW 10.93.020(4).

10 Plaintiffs assert that because Washington State law only grants the LCB enforcement  
 11 authority for laws related to liquor and because LCB enforcement officers are not general  
 12 authority peace officers, they lack authority to enforce “criminal cannabis statutes.” Compl. ¶  
 13 ¶14, 19. Plaintiffs contend that after various legislative attempts to obtain general authority  
 14 status for its officers, LCB inappropriately adopted a policy in which LCB refers to  
 15 enforcement personnel as “peace officers,” possessing the authority to carry firearms and, in  
 16 certain circumstances, conduct arrests without warrant. Compl. ¶ ¶ 36–39. Additionally,  
 17 Plaintiffs allege that the LCB “imperils cannabis users” by not requiring testing to check for  
 18 impurities or contamination. Compl. ¶ 49. Last, Plaintiffs argue that due to changes in  
 19 Washington State law, Plaintiff Novak cannot obtain consistent access to the strains of  
 20 marijuana that address his health issues. Compl. ¶ ¶ 58–61.

23 Plaintiffs assert that the foregoing constitute violations of both substantive and  
 24 procedural due process rights guaranteed by the Fifth and Fourteenth Amendments to the  
 25 United States Constitution, providing a basis for a claim under 42 U.S.C. § 1983. Compl. 17.

1 As a remedy for the alleged violations, Plaintiffs seek an injunction, prohibiting LCB from  
 2 using the word “[p]olice” to describe its officers that Plaintiffs deem improperly trained as well  
 3 as preventing such officers from taking any enforcement action. Compl. 18. Plaintiffs also seek  
 4 to enjoin all pending enforcement matters associated with these officers as well as an order  
 5 deeming all criminal cases brought against individuals “under the artificially enlarged LCB  
 6 ambit” as moot. *Id.* Last, Plaintiffs request an order, requiring the LCB to develop a marijuana-  
 7 testing regimen to uncover various potential contaminants and to recall all products who fail  
 8 to meet testing standards. *Id.*

### 10 **C. Argument and Authority**

11 This Court should dismiss all claims against the State Defendants under Federal Rules  
 12 of Civil Procedure (FRCP) 12(b)(1) because Plaintiffs requested relief depends on resolution  
 13 of questions of Washington State, not federal law. Alternatively, Eleventh Amendment  
 14 immunity or qualified immunity bars all causes of action against the State Defendants.  
 15

#### 16 **1. Plaintiffs’ fail to establish a Federal Cause of Action**

17 Congress has granted federal courts jurisdiction over “all civil actions arising under the  
 18 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A case arise[es] under  
 19 federal law within the meaning of § 1331 ... if a well-pleaded complaint establishes either that  
 20 federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends  
 21 on resolution of a substantial question of federal law.” *Cook Inlet Region, Inc., v. Rude*, 690  
 22 F.3d 1127, 1130 (9th Cir. 2012). A plaintiff may not establish federal jurisdiction by including  
 23 in its complaint allegations of federal-law questions that are not essential to its claim. *Coeur*  
 24 *d’Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019).  
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 26

1 The burden of demonstrating a federal question on a motion to dismiss for lack of  
 2 jurisdiction rests entirely on the party seeking to invoke the court's jurisdiction, even though  
 3 this Court may accept all material allegations of fact in the complaint as true for the purposes  
 4 of this motion. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir.  
 5 2010). Plaintiff has failed to show that the complaint raises a federal question.  
 6

7 The Complaint mentions 42 U.S.C. § 1983 in a conclusory fashion in one paragraph of  
 8 the Complaint, but “§ 1983 does not create a cause of action against state agencies . . . for  
 9 constitutional wrongs.” *Sanem v. Doe*, No. CV 19-6-M-DLC-JCL, 2019 WL 1895044, at \*1  
 10 (D. Mont. 2019) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65, 71, 109 S. Ct.  
 11 2304, 105 L. Ed. 2d 45 (1989), and *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004)).  
 12 Even taken together with allegations citing to the Fifth and Fourteenth Amendments, these  
 13 allegations of federal questions are not central to Plaintiffs’ claim. *Coeur d’Alene Tribe*, 933  
 14 F.3d at 1055. In fact, Plaintiffs’ entire claim rests on the proper interpretation of Washington  
 15 State statutes and the authority granted to LCB thereunder. Additionally, Plaintiffs’ requested  
 16 relief in the form of injunctions prohibiting LCB from using the word “[p]olice” to describe its  
 17 officers and preventing such officers from taking any enforcement action as well as requiring  
 18 the LCB to develop marijuana testing standards depends on resolution of a question of state,  
 19 not federal law. *Cook Inlet*, 690 F.3d at 1130. Plaintiffs’ inclusion of surface allegations of  
 20 federal law questions does not overcome the fact that their claims and requested relief all  
 21 depend on interpretation of Washington State’s laws. As such, Plaintiffs fail to invoke this  
 22 Court’s jurisdiction and this action should be dismissed.  
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**2. In the alternative, all claims against State Defendants should be dismissed for lack of personal jurisdiction**

Alternatively, the Court should dismiss all causes of action against the State Defendants because Eleventh Amendment immunity bars all claims against the LCB, and the named state officials in their official capacity. Moreover, this Court should dismiss any cause of action under 42 U.S.C. § 1983 as not properly pled and further barred by the doctrine of qualified immunity.

The Eleventh Amendment to the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

This Constitutional provision bars actions against states in federal court, absent that state's consent. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). A state's immunity from suit extends to its "agencies or departments," such as the State Liquor and Cannabis Board. *Pennhurst*, 465 U.S. at 100. Any consent by a state to a waiver of its immunity from suit must be "unequivocally expressed." *Id.* at 99.

The LCB is a state agency constituted pursuant to Title 66, Chapter 66.08, Section .012 of the RCW. The LCB shares Washington's immunity from suit in federal court. *Pennhurst*, 465 U.S. at 99–100. The LCB has not consented to waive its Eleventh Amendment immunity and Plaintiffs do not offer any allegations to the contrary. As such, this Court lacks jurisdiction over the LCB and it should be dismissed from this action.

1 Plaintiffs also name the Governor of the State of Washington, the Attorney General of  
 2 Washington, and the LCB's Chair and Executive Director in both their official and personal  
 3 capacities. "[A] suit against a state official in his or her official capacity is not a suit against  
 4 the official but rather is a suit against the official's office." *Will*, 491 U.S. at 71. The law is  
 5 particularly clear that any claim against state officials alleging that they "violated state law in  
 6 carrying out their official responsibilities is a claim against the State that is protected by the  
 7 Eleventh Amendment." *Pennhurst*, 465 U.S. at 121. Thus, the Eleventh Amendment bars suits  
 8 filed against state agencies and state officers based on violations of state law, *Id.* at 106, and  
 9 Plaintiffs' claims against the state officers in their official capacity should be dismissed.  
 10 Plaintiffs' claims brought against the named state officials in their personal capacities are  
 11 equally defective and should also be dismissed.

12  
 13  
 14 The Eleventh Amendment does not bar suits under 42 U.S.C. § 1983 against state  
 15 officers in their personal capacities that seek prospective injunctive relief. *Ex Parte Young*, 209  
 16 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). However, a "complaint must contain sufficient  
 17 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and  
 18 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
 19 statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L. Ed.  
 20 2d 868 (2009).

21  
 22 Here, Plaintiffs allege that the state officials acting in their personal capacities,  
 23 "engineered or omitted the ongoing unlawful and unconstitutional deprivations" described in  
 24 the Complaint, constituting violations of their Fifth and Fourteenth Amendment rights as well  
 25 as their rights under 42 U.S.C §§ 1983. Compl. 17. Additionally, the Complaint asserts that  
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1 “[u]nder color of law pursuant to 42 U.S.C. § 1983 and [o]ut of [d]esign, [p]attern and  
 2 [p]ractice that no reasonable [l]aw [e]nforcement [o]fficer would allow LCB has proceeded to  
 3 enforce criminal cannabis statutes that it has no right to enforce... .” Compl. ¶14. Because the  
 4 Complaint only mentions 42 U.S.C §§ 1983 in a conclusory fashion, Plaintiffs fail to properly  
 5 plead a cause of action under that statute and this Court should dismiss any claims arising  
 6 under 42 U.S.C. § 1983 against the state officials in their personal capacities. Furthermore,  
 7 qualified immunity bars Plaintiffs’ claims against state officials in their personal capacities.  
 8

9       Qualified immunity shields government officials performing discretionary functions as  
 10 long as their conduct does not violate clearly established constitutional law of which a  
 11 reasonable person should have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct.  
 12 808, 172 L. Ed. 2d 565 (2009). The test is whether the facts alleged by the plaintiff make out  
 13 a violation of a constitutional right and, second, whether the right at issue was “clearly  
 14 established” at the time of the alleged violation. *Id.* at 232.  
 15

16       Here, Plaintiffs allege generally that the State Defendants violated their Fifth and  
 17 Fourteenth Amendment rights as well as their rights under 42 U.S.C §1983 by allowing the  
 18 activities described in the Complaint. Compl. 17. Plaintiffs’ allege nothing, however, regarding  
 19 how the alleged lack of quality and variety in available marijuana strains or the purported  
 20 deficiency in training for LCB enforcement officers violates their protections against self-  
 21 incrimination and involuntary servitude, due process rights, or their right to equal protection  
 22 of the laws. Consequently, Plaintiffs fail to allege any clearly established constitutional right  
 23 implicated under the facts of this case. Second, it is objectively reasonable for the LCB Board  
 24 Chair and Executive Director not to interfere with the LCB’s regulation and enforcement of  
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1 Washington State's marijuana laws. Moreover, Plaintiffs make no factual allegations regarding  
 2 how Governor Jay Inslee or Attorney General Bob Ferguson violated any constitutional rights.  
 3 For these reasons, the Court should dismiss the 42 U.S.C. § 1983 claims brought against the  
 4 individually named state officials.  
 5

### 6 **III. CONCLUSION**

7 For these reasons, this Court should grant the State Defendants' motion to dismiss this  
 8 action for lack of jurisdiction.  
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10  
 11 DATED this 19th day of November, 2020.  
 12

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20 Counsel for State Defendants  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2020, I caused the foregoing STATE DEFENDANTS' MOTION TO DISMISS, DECLARATION OF MICHELLE CARR and PROPOSED ORDER to be served upon the below listed Plaintiff by First Class United States mail, marked for delivery to:

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Via PACER portal:

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THE HONORABLE RICHARD JONES  
U.S. DISTRICT COURT W.D. WASHINGTON  
700 STEWART STREET SUITE 13128  
SEATTLE, WA 98101-9906

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of November 2020 at Olympia, WA.

/s/ K'Laine S. Hatfield  
K'LAINÉ S. HATFIELD  
Legal Assistant